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Supreme Court, U.S.
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No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

vs.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION, AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS

NAVAJO NATION
DEPARTMENT OF JUSTICE

LEVON B. HENRY
Attorney General
MARCELINO R. GOMEZ*
Assistant Attorney General
P.O. Drawer 2010
Window Rock, Navajo Nation
(AZ) 86515
(520) 871-6347

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Navajo Nation may impose a hotel occupancy tax on travelers temporarily lodged at a hotel located on an isolated parcel of fee land within the reservation boundary, when:

a) The reservation consists almost entirely of Indian trust lands;

b) The population of the reservation is overwhelmingly Navajo; and

c) The Navajo Nation government provides a broad range of governmental services, including police and fire protection, emergency medical, and tourism promotion.

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STATEMENT OF THE CASE

Petitioner, Atkinson Trading Company ("Atkinson Trading"), is a New Mexico Corporation. Pet'r App. 95a.[1] Atkinson Trading operates a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park on a small parcel of fee land within the exterior boundary of the Navajo Reservation. The business is known as the Cameron Trading Post. Pet'r App. 96a. Atkinson Trading engages in the sale of Indian arts and crafts including beadwork, baskets, textiles, rugs and jewelry. J.A. 34. Atkinson Trading has also engaged in sales to members of the Navajo Nation and purchased arts and crafts from them. Pet'r App. 96a. Atkinson Trading has approximately 120 employees, 75-80 percent of whom are members of the Navajo Nation. Pet'r App. 96a.

The Navajo Nation is a federally recognized Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah. Pet'r App. 96a. The Navajo Nation is the largest Indian tribe in the nation, both in land area and population. The United States set apart a reservation for the Navajos by treaty in 1868 (15 Stat. 667), and the reservation has been repeatedly enlarged by executive order and statute. *See* J. Lee Correll & Alfred Dehiya, *Anatomy of the Navajo Indian Reservation*, (rev. ed. 1976). Approximately 99.74 percent of the 13,574,060 acre reservation area is held in trust by the United States for the benefit of the Navajo Nation or its members. Approximately 99.5 percent of land area within the Cameron Chapter is held in trust for the benefit the

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[1] Petitioner's Appendix shall be referenced as Pet'r App.

Navajo Tribe or its members. The 1990 Census shows the population of the Navajo Nation as 151,105 with 96.6 percent Navajo members. The population of Cameron Chapter in 1990, where the Cameron Trading Post is located, was 1,035 with 97.7% Navajo. J.L. 181.

By Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62, ("1934 Act"), the exterior boundaries of the Navajo Nation were confirmed. Petitioner's property is completely surrounded by Navajo Nation reservation trust lands. Pet'r App. 96a. The 1934 Act provided an opportunity for any owners of private lands located within the 1934 Reservation boundary to exchange those lands for public lands outside the reservation boundary. *Id.* at § 2. Atkinson's predecessor chose not to take advantage of the land exchange opportunity and remained within the Navajo Indian Reservation.

Atkinson Trading advertises and promotes its Cameron Trading Post business as a way to experience the tradition of an old west Indian trading post operation. *Cameron Trading Post, Old West Hospitality, Modern Comforts,* (visited Feb. 5, 2001) <*http://camerontradingpost.com/history.htm.*> The Cameron Trading Post is portrayed as one of the last authentic trading posts. It continues to serve as an active trade and cultural center blending modern commerce with traditional Indian trading customs. The Cameron Trading Post has been described as an integral part of the surrounding Indian communities. *Id.* The Cameron Trading Post was built in 1916 by Hubert Richardson. Gladwell Richardson, *Navajo Trader,*

135-145 (University of Arizona Press 1986).[2] Hubert Richardson chose the Cameron location because of its proximity to and the potential trading opportunities with wealthy Navajo cattlemen. *Navajo Trader*, 136-137.

Federal Highway 89 and State Highway 64 pass over rights-of-way granted by the Navajo Nation. The highways are jointly patrolled by the Arizona state and Navajo tribal police but the tribal police force is the primary provider of police protection to the Trading Post and the Cameron community. Pet'r App. 57a. A substation of the Navajo Nation police department is located in Cameron. Pet'r App. 57a. When the emergency number 911 is dialed from Atkinson Trading, the response is made by the Navajo Nation Police Department. Pet'r App. 97a. The Navajo police enforce a non-loitering policy on the Cameron Trading Post property. The Navajo police provide assistance to motorists on the highways leading to the Trading Post, including giving directions and changing flat tires. Pet'r App. 57a.

The Navajo fire and the Bureau of Indian Affairs fire departments provide the primary response to calls from the Cameron area. There has been at least one fire at the Trading Post to which the Navajo fire department responded. Pet'r App. 57a. The tribal police and fire departments have also responded to many calls concerning auto accidents in the Cameron area involving both Navajos and non-Navajos. Pet'r App. 58a.

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[2] Gladwell Richardson was the nephew of Hubert Richardson, the founder of the Cameron Trading Post. *Navajo Traders*, at 135.

Emergency medical services in the Cameron area are provided by the Navajo Nation Emergency Medical Service Department. This Department responds to all calls within the Navajo Nation including numerous calls from the Cameron area. Pet'r App. 58a. The Navajo Nation provides a variety of health services to members and nonmembers through the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the territorial jurisdiction of the Navajo Nation. Pet'r App. 97a. Atkinson Trading has disposed of its solid waste on the Navajo Reservation. J.A. 40-41. The Navajo Nation Tourism Department uses tribal funds to provide facilities at several tourist areas on the Navajo Nation to promote the health and safety of tourists traveling across the Navajo Nation. Pet'r App. 97a. These governmental services directly benefit Atkinson Trading Company. The Navajo Nation Government funds a broad range of government activities, including economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions. Pet'r App. 98a.

Tourism attractions on the Navajo Nation are visited by more than 2,000,000 tourists a year. Exh. F at 127. The majority of these tourists visit historical sites or experience Indian culture. J.A. 71. In the early days of the Cameron Trading Post, just as they are now, tourists were filled with curiosity about the Navajo. *Navajo Trader*, at 142. Travelers also visit the Navajo Nation because of their interest in arts and crafts and outdoor recreation. J.A. 71.

On July 30, 1992, the Navajo Hotel Occupancy Tax was signed into law by the President of the Navajo Nation. The Hotel Occupancy Tax taxes all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation. Pet'r App. 98a. The Hotel Occupancy Tax requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission and file reports on the tax with the Navajo Tax Commission. Pet'r App. 98a. The rate of the tax is eight percent of the price of the room. 24 N.N.C. § 103. The hotel operator is allowed to retain one percent of the tax due as reimbursement for the cost of collecting the tax. 24 N.N.C. § 109. The Hotel Occupancy Tax is imposed on travelers at all hotels within the exterior boundaries of the Navajo Nation without regard to whether the hotel is located on trust or fee land. Pet'r App. 98a. All of the hotels within the Navajo Nation collect and pay the tax. The Navajo Nation currently collects approximately $1,200,000.00 per year from the hotel occupancy tax. The tax collected and remitted by Atkinson Trading from its guests amounts to less than seven percent of the total hotel occupancy taxes collected by the Navajo Nation.

In addition to the Hotel Occupancy Tax, the Office of the Navajo Tax Commission administers a Business Activity Tax, 24 N.N.C. §§ 401 *et seq.*, a Possessory Interest Tax, 24 N.N.C. §§ 201 *et seq.*, an Oil and Gas Severance Tax, 24 N.N.C. §§ 301 *et seq.*, a Tobacco Products Tax, 24 N.N.C. §§ 800 *et seq.*, and a Fuel Excise Tax, 24 N.N.C. §§ 901 *et seq.* Like the Hotel Occupancy Tax, none of the

tax statutes distinguish between taxpayers on the basis of tribal membership. Currently, joint compliance and enforcement agreements between the Navajo Nation and the States of Arizona and New Mexico are in effect.[3]

SUMMARY OF ARGUMENT

The taxing power of the Navajo Nation is an attribute of its retained sovereignty. The taxing power enables a tribal government to fund its essential governmental services, including police and fire protection. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

The Navajo Nation government is the primary provider of governmental services within the exterior boundaries of the 13.5 million acre Navajo reservation. Pet'r. App. 97-98a. Travelers voluntarily enter the Navajo Reservation and choose to stay overnight. While there,

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[3] The Office of the Navajo Tax Commission has entered into an intergovernmental agreement with the Arizona Department of Revenue for the joint audit and collection of the tobacco products taxes. (March 24, 1998). The Office of the Navajo Tax Commission has entered into intergovernmental agreements with the Arizona Department of Transportation (May 19, 1999) and the New Mexico Taxation and Revenue Department (February 29, 2000) for the joint audit and collection of the-fuel excise taxes. The Office of the Navajo Tax Commission has entered into an intergovernmental agreement with the Arizona Department of Revenue for the joint audit and collection of the Navajo Hotel Occupancy Tax, the Navajo Business Activity Tax and the Arizona Transaction Privilege Tax. (February 8, 2001).

these travelers benefit from the provision of police protection and other governmental services as well as the advantages of a civilized society that are assured by the existence of the Navajo Nation government. *Merrion,* 455 U.S. at 137-138; *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a tax very similar to the Navajo Hotel Occupancy Tax when they provide comparable governmental services. 24 N.N.C. §§ 101 *et seq.*

The Navajo Reservation like the Jicarilla Reservation in *Merrion* is overwhelmingly Indian in character. Ninety-nine and seven-tenths percent of the land area is held in trust by the United States for the benefit of the Navajo Nation or its members. Approximately 97 percent of the population is Navajo. The enormous trust land area, the large Navajo population, and the predominance of Navajo governmental services authenticates its dominant Indian character.

The fact that a very small parcel of land within its reservation is owned in fee does not deprive the Navajo Nation of the authority to tax to raise revenues to defray the costs of government. *Merrion,* 455 U.S. at 144.

Montana v. United States concerned the ability of the Crow Tribe to regulate hunting and fishing by nonmembers on lands owned in fee simple by nonmembers, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States,* 450 U.S. 544 (1981). The Court's acknowledgment of an Indian nation's inherent taxing authority is clearly set forth in the decisions that form the basis of the exception

to the *Montana* rule cited by this Court in its decision. The inherent authority exception interpretation of *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), in *Montana* has been consistently recognized by the Court in other cases. In *Merrion*, the Court reiterated that the Jicarilla's power to tax was not simply based on the tribe's right to exclude, but was an inherent power of the Jicarilla Tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-144 (1982).

The Court characterized its understanding of the type of cases that fit within the first *Montana* inherent authority exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). It is abundantly clear that the trilogy of decisions in *Montana*, *Merrion* and *Strate* recognize a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases have cited to *Buster* as being an exception to the *Montana* rule. *Montana* and *Strate* do not limit a tribe's taxing authority over noncitizens on fee land within the exterior boundaries of an Indian reservation. In fact, they both recognize the tribal taxing power as an inherent authority exception to the general rule in *Montana*.

ARGUMENT

I. THE NAVAJO NATION RETAINS INHERENT POWER TO TAX ACTIVITIES WITHIN THE EXTERIOR BOUNDARIES OF THE NAVAJO NATION.

A. The Power To Tax Is A Fundamental Attribute Of Sovereignty Which The Navajo Nation Retains.

The power to tax is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (*Colville*). The taxing power enables a tribal government to raise revenues to fund its essential governmental services and to defray the cost by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs. *Kerr McGee v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985); see President's Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983).

This Court has recognized taxes are a means of distributing the burden of the cost of government. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508 (1937). The most fundamental principle of government is that it exists to provide for the common good. A taxpayer cannot object to the use of the taxes for the maintenance of schools because it has no children. *Thomas v. Gay*, 169

U.S. 264 (1898). Taxes are not an assessment of specific benefits to the taxpayer. The only benefit to which a taxpayer is entitled is his enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes. *Carmichael*, 301 U.S. at 522. The Court has repudiated the suggestion that the benefits derived from the expenditure of public moneys are required to be apportioned to the burdens of the taxpayer or that he can resist the payment of the tax because it is expended for purposes which are not peculiarly beneficial to him. *Carmichael*, 301 U.S. at 521-523.

The Court has acknowledged it is not unfair to ask a taxpayer to share in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980), quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). See *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, 435 U.S., at 750-751, *id.*, at 764, (POWELL, J., concurring in part and concurring in result); *General Motors Corp. v. Washington*, 377 U.S. 436, 440-441 (1964). Atkinson Trading is asking this Court to relieve it of the responsibility of collecting and remitting the Navajo Hotel Occupancy Tax. Pet'r Brief at 41. Atkinson is seeking to gain a competitive advantage as against other hotel operators on the Navajo Reservation.[4] The

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[4] If Atkinson Trading were not required to collect and remit the eight percent hotel occupancy tax on behalf of its customers, it would gain an eight percent pricing advantage against other hotel operators within the Navajo Nation that do collect and remit the tax.

burden imposed on travelers visiting the Navajo Nation through application of the hotel occupancy tax is limited and consistent with the governmental services received by both the travelers and Atkinson Trading. There is no tax principle that requires the taxes received from a taxpayer to equal the benefits it receives. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190 (1989). Any limitation tied to the benefits received would place such commerce in a privileged position. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-624 (1981). The Court has applied these same taxation principles when it has considered the basis and extent of tribal taxing authority. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (*Colville*), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Kerr McGee v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

The reservation in *Merrion* was very similar to the Navajo reservation. The Jicarilla Apache Tribe's reservation contains 742,315 acres, all of which are held as tribal trust property. *Merrion*, 455 U.S. at 133. In this case, 13,538,775 acres or 99.74% of the land area within the boundaries of the Navajo reservation is held in trust by the United States. Approximately 2,100 individuals lived on the Jicarilla Apache reservation. In this case, more than 150,000 Navajos reside on the Navajo Reservation. However, in *Merrion*, there was no discussion of the extent of tribal governmental services provided. In this case, there is extensive evidentiary proof of the nature and magnitude of the Navajo government's presence in the area. Pet'r App. 97a-98a.

In a case involving the tribal zoning power, Justice Stevens, announced the judgment of the Court holding

that the Tribe had authority to zone private fee lands located within the Yakima Indian Reservation. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989). The fact that a very small proportion of the closed area was owned in fee did not deprive the Tribe of the right to ensure that this area maintained its unadulterated character. This is particularly so in a case such as this in which the hotel occupancy tax at issue is neutrally applied, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest. *Brendale,* 492 U.S. at 444. The Hotel Occupancy Tax at issue in this case is neutrally applied to all people who rent a room within the Navajo Nation. All people in the class of people who rent rooms are treated the same. *Miami Dolphins Ltd. v. Metropolitan Dade County,* 394 So. 2d 981 (Fla. 1981). The burden of the tax falls equally upon those who exercise the privilege of occupying a room within the Navajo Nation. *Gowens v. City of Bakersfield,* 13 Cal Rptr. 820, 824 (1961).

Justice Stevens described zoning as the process whereby a community defines its essential character. The community determines its character driven by a concern for health and safety, esthetics, or other public values. Zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually or more often unilaterally destructive. *Brendale,* 492 U.S. at 433. Taxes are viewed as a means of distributing the burden of the cost of government. *Carmichael v. Southern Coal & Coke Co.* 301 U.S. 495, 508 (1937). The most fundamental principle of government is that it exists to provide for the common good. *Thomas v. Gay,* 169 U.S. 264 (1898). The purpose of zoning is the protection of the community

and the public. The purpose of taxes is to fund services for the public good.

Justice Stevens explained that since Yakima maintained the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe preserved the power to define the essential character of that area. The closed portion of the Yakima Reservation occupied 807,000 acres with 25,000 or three percent of these acres being owned in fee. *Brendale,* 492 U.S. at 438. In the instant case, 99.74% of the 13.5 million acre Navajo Reservation is held in trust for the Navajo Nation or individual tribal members by the United States. Less than three-tenths of one percent of the entire land area within the exterior boundaries of the Navajo Reservation is held in fee by nonmembers. The 1990 Census shows the population of the Navajo Nation as 96.6% Navajo. J.L. 182. The population of Cameron Chapter in 1990, where the Cameron Trading Post is located, was 1,035 with 97.7% Navajo. J.L. 181.

The Navajo Nation is without question the primary provider of governmental services on the Navajo reservation and specifically in the Cameron Chapter community area. Pet'r App. 97-98a. It is clear that the Navajo Nation has assumed the responsibility for the preservation of an organized society within the Navajo Reservation.[5]

There can be no disagreement that the Navajo Nation and the Cameron Chapter possess an overwhelming

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[5] The Navajo Nation expends its general fund revenues to fund a wide array of governmental functions which creates the environment that enables businesses such as Atkinson Trading to engage in economic activity and allows tourists to experience the scenery and culture of the Navajo Nation. J.L. 166.

Indian character. The enormous trust land area, the large Navajo population and the predominance of Navajo governmental services in the area establish its fundamental Indian character. By maintaining the power to exclude nonmembers from entering all but a very small portion of the Navajo Nation, the tribe has preserved the power to tax to raise revenues to pay for the costs of government. *Merrion,* 455 U.S. at 144. The fact that nonmembers may now drive on certain highways does not change the character of the reservation nor undermine the tribe's power to tax. *Brendale,* 492 U.S. at 439. The Hotel Occupancy Tax does not interfere with any state or county interest present here.[6] On the contrary, the Navajo Nation and the State of Arizona have cooperated in the compliance and collection of mutual taxes through joint audit and enforcement agreements. One of the agreements covers this very Hotel Occupancy Tax. The agreement provides for the joint audit, enforcement and sharing of information with respect to this and other taxes.

The fact that a minuscule proportion of the Navajo Nation is owned in fee does not deprive the Tribe of the power to tax to contribute to the general cost of providing governmental services. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623-624 (1981). This is particularly true in a case such as this in which the taxing statute at issue is neutrally applied, is necessary to protect the welfare of the Tribe by funding essential governmental services, and does not interfere with any significant state or county interest. *Brendale,* 492 U.S. at 444.

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[6] It is important to note that the State of Arizona did not file an amicus brief in support of petitioner.

In *Merrion*, the Petitioner availed itself of the "substantial privilege of carrying on business" on the reservation. *Merrion*, 455 U.S. at 137; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940). These travelers enter the Navajo Reservation and choose to stay overnight. They voluntarily put themselves in the position of possibly needing assistance from Navajo Nation government personnel. Motor vehicle accidents involving tourists have occurred. Navajo Nation police, fire and emergency medical personnel have responded to such accidents in the past and are available to respond in the future. Tribal police officers provide directions to travelers and provide other assistance. Tribal police patrol the Cameron Trading Post and remove loiterers and intoxicated individuals. The mere presence of the Navajo Nation police on the highways, enforcing traffic and other laws, contributes to the health and safety of the travelers through the deterrence of unsafe or illegal behavior. The Navajo Nation's Tourism Department provides information to travelers and works on projects designed to enhance the experience of travelers visiting the reservation. Pet'r App. 66a. In sum, these travelers benefit from the provision of police protection and other governmental services, as well as from " 'the advantages of a civilized society' " that are assured by the existence of the Navajo Nation government. *Merrion*, 455 U.S. at 137-138; *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a hotel occupancy tax similar

to that imposed by the Navajo Nation when they provide comparable services.

Under these circumstances, there is nothing exceptional in requiring travelers to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. at 138, Cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-629, (1981); *id.*, at 647 (BLACKMUN, J., dissenting); *Mobil Oil Corp. v. Commissioner of Taxes, supra*, 445 U.S. at 436-437. This Court has recognized the congressional concern with "fostering tribal self-government" through various Acts governing Indian tribes.[7] *Colville*, 447 U.S., at 155. It simply does not make sense to expect the tribes to carry out governmental functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes, severance taxes, or hotel occupancy taxes. *Merrion*, 455 U.S. at 138 n.5.

In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S.134 (1980), decided only 10 months prior to *Montana*, the Court upheld the Tribes' transaction tax on tobacco sales whose legal incidence fell primarily

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[7] The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* (1975), evidence to varying degrees a congressional concern with fostering tribal self-government. *See also*: Indian Self-Determination and Education Assistance Act Amendments of 1988, P.L. 100-472, Title I, § 101, 102 Stat. 2285 (1988); and the Tribal Self-Governance Act of 1994, P.L. 103-413, Title II, § 201, 108 Stat. 4270 (1994).

upon non-Indians. The transactions occurred in retail outlets located on trust land. The Court held that the power to tax non-Indians was not inconsistent with the Tribes' dependent status and had not been preempted by congressional legislation or state taxes on the same tax base. But the Court also upheld the State of Washington's concurrent tax on nonmember purchases even though the transactions occurred on trust land, holding that both governments possessed a legitimate interest in raising revenue to fund services. *Colville*, 447 U.S. 156-57.

The widely held understanding within the Federal Government that federal law has not worked a divestiture of Indian taxing power has been consistently expressed. *Colville*, 447 U.S. at 152. Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. *Colville*, 447 U.S. at 152, 153; 17 Op. Att'y Gen. 134 (1881); 7 Op. Att'y Gen. 174 (1855), including jurisdiction to tax, 23 Op. Att'y Gen. 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934). According to the Solicitor of the Department of the Interior:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions. *Ibid.* (emphasis added).

In these respects, the present case is markedly different from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which the Court stressed the shared assumptions of the Executive, Judicial, and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians. In the present case, there is simply no overriding federal interest that would necessarily be frustrated by the application of the Navajo Hotel Occupancy Tax to travelers who enter the reservation and then choose to stay overnight within the exterior boundaries of the Navajo Nation.

B. The Navajo Nation's Power To Govern And Pay For The Costs Of Government Provide The Basis For The Authority To Tax.

The power of taxation rests on a tribe's territorial jurisdiction, and not solely on the power to exclude nonmembers from the reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143 (1982). In *Merrion*, the Court upheld the Jicarilla Apaches' right to impose a severance tax on non-Indian oil and gas production on the reservation. The activity taxed occurred on trust land pursuant to leases providing the lessees the exclusive right to extract oil and gas on the lease premise for so long as the minerals are produced in paying quantities. The petitioners argued that since the activity took place on trust land, the tribe lacked authority to impose the tax because it had ceded its power to exclude the nonmember lessee upon entering into the leases. The Court rejected the assertion that an Indian tribe's authority to tax non-

Indians who do business on the reservation stems exclusively from its power to exclude such persons from tribal land. The Court in *Merrion* explained:

> . . . there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Merrion, 455 U.S. at 142. Under this analysis, the fact that it is a nonmember conducting business with mostly nonmembers on fee land has no bearing on the tribe's power to tax, so long as the activity to be taxed is within the governmental jurisdiction of the tribe. *Merrion*, 455 U.S. at 141, 142.

The Court did not believe that the territorial component to Indian taxing power meant that the tribal authority to tax was derived solely from the tribe's power to exclude nonmembers from tribal lands. This Court explained that:

> . . . the decision in *Buster v. Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster v. Wright*.

> In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorporated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*" 135 F., at 952 (emphasis added). This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Merrion, 455 U.S. at 143, 144. The Court chose not to embrace a new restriction on the extent of the tribal authority to tax. It concluded that the Tribe had the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and to pay for the costs of self-government based on the views of each of the federal branches, *general principles of taxation*, and the conception of Indian tribes as domestic, dependent nations. *Merrion*, 455 U.S. at 143-144. Atkinson argues that the tax should not apply because its land when originally acquired was not within the reservation boundary. Pet'r Brief at 3. Atkinson Trading's predecessor chose not to take advantage of the land exchange

opportunity under the 1934 Act and remained within the Navajo Indian Reservation. But these sorts of changed circumstances which were much more significant in *Buster* had no impact on the Court's analysis there, and similarly should not affect the Court's determination here.

Here as in *Merrion* the Court should measure tribal taxing power by standards regularly applied to states. So long as the tax is fairly apportioned, and is levied upon those whose activity presents a nexus with the taxing entity, there is nothing exceptional in requiring Atkinson to remit and the Navajo Nation travelers to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. 130, at 138, 156; *citing to Commonwealth Edison v. Montana*, 453 U.S. 609 (1981), and *quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). These travelers willingly enter the Navajo Reservation and stay overnight. The Navajo Nation government is available to provide governmental services to these travelers as needed. Travelers benefit from the provision of police protection and other governmental services, as well as from " 'the advantages of a civilized society' " that are assured by the existence of tribal government throughout the Navajo Reservation and at the Cameron Trading Post. *Merrion*, 455 U.S. at 137-138; *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a hotel occupancy tax similar to that imposed by the Navajo Nation when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring the travelers to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. at 138, Cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

624-629 (1981); *id.*, at 647 (BLACKMUN, J., dissenting); *Mobil Oil Corp. v. Commissioner of Taxes*, supra, 445 U.S. at 436-437. Atkinson Trading engages in a business on the property known as the Cameron Trading Post. Pet'r App. 96a. Atkinson Trading conducts business with members of the Navajo Nation as it has since the founding of the Cameron Trading Post. Pet'r App. 96a; *Cameron Trading Post, Old West Hospitality, Modern Comforts* (visited Feb. 5, 2001) <*http://camerontradingpost.com/history.htm.*> There really can be no argument that the Navajo Nation has provided the economic environment which allows the travelers to visit and stay on the Navajo Nation. It is only fair to require these travelers to contribute to the general cost of providing governmental services from which they benefit. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-624 (1981).

II. NEITHER *MONTANA* NOR *STRATE* LIMIT THE NAVAJO NATION'S TAXING AUTHORITY IN THIS CASE.

A. *Montana v. U.S.* Recognizes The Inherent Taxing Jurisdiction Of An Indian Nation Over Indian Traders And Their Economic Activities.

Montana v. United States concerned the authority of the Crow Tribe to regulate hunting and fishing by non-members on fee lands owned by nonmembers, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, approximately 28 percent of the reservation was held in fee by non-Indians. *Montana*, 450 U.S. 549. In this case less than three-tenths of one percent of the reservation is held in fee by nonmembers. In *Montana*,

the State of Montana stocked the waters of the reservation with fish. *Montana,* 450 U.S. 549. In this case the Navajo government is the predominant provider of governmental services. Pet'r App. 97-97a.

Montana is not a tax case. It is a case involving regulatory authority. The regulatory statute at issue in *Montana* was not like the field of taxation, where the laws of both the Tribe and the State may be enforced simultaneously. *Colville,* 447 U.S. at 158. Regulatory statutes do not allow for dual application of conflicting regulatory statutes. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 343, 344 (1983). Taxation aimed at regulating an activity would fall under *Montana's* test. This Court's recognition of an Indian nation's inherent taxing authority is best illustrated by reviewing one of the cases that forms the foundation of the exception to the *Montana* rule cited by the Court in its decision. The Court in *Montana* acknowledged the inherent taxing authority of Indian nations by declaring:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, *through taxation,* licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity,

> the economic security, or the health or welfare of the tribe.

Id. at 565-566 (emphasis added).

The *Montana* Court's decision explicitly held that a tribe may regulate, through taxation. *Id.* at 565. One of the cases cited by the Court for the *Montana* inherent power exception was *Buster v. Wright*. *Id.* at 565. In *Buster*, C.W. Buster, a non-Indian, owned and operated a grocery store located on fee land which was surrounded by reservation trust land. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) *appeal dismissed*, 203 U.S. 599 (1906). The Eighth Circuit held that Buster, the trader, was subject to a tribal tax imposed by the Creek Nation and that the tribe could employ the Secretary of the Interior to enforce it. 135 F. at 954.

The authority of the tribe to tax the non-Indian trader was not based on the tribe's ability to exclude Mr. Buster from the exterior boundaries of the Creek Indian Reservation. Instead the authority was found to be inherent, and the fee status of the land was simply not relevant to the question of tribal power to tax. The *Buster* court stated:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

135 F. 950. The *Buster* Court recognized that a tribal government has the power to tax the economic activity of those who choose to engage in economic activity within the exterior boundaries of an Indian reservation. There is no express congressional act that specifically exempts Indian traders from their responsibility to collect or pay Indian taxes. Like the Indian trader in *Buster,* Atkinson is subject to conditions which the Navajo Nation may choose to put upon its privilege of doing business within the reservation. Like the Creek Nation in *Buster,* the Nation possesses the lawful authority to require the remittance of the tax collected as a condition precedent to the exercise of the privilege of trading within its borders. *Buster,* at 949. The authority of the Navajo Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in an act of Congress, treaty, or agreement of the United States. Instead, it is one of the inherent and essential attributes of its original sovereignty. *Merrion,* 455 U.S. at 141. It is an inherent right of the Navajo Nation, indispensable to its autonomy as a distinct tribe or nation, and it remains an attribute of its government. *Buster,* at 950.

It is important to note that Atkinson Trading has been determined to be an Indian Trader under 25 U.S.C. §§ 261 *et seq.* and 25 C.F.R. § 141. *Ashcroft v. United States Dept. of Interior,* 679 F.2d 196, 199 (9th Cir. 1982). As an Indian Trader, Atkinson's circumstance is virtually identical to that of C.W. Buster. The activities carried on by Atkinson Trading are very similar to the activities carried on by C.W. Buster and there is no legitimate way to distinguish this case from *Buster.*

B. *Strate v. A-1 Contractors* Reaffirms The Inherent Taxing Jurisdiction Of An Indian Nation Over Indian Traders And Their Economic Activities.

More recently, the Court reiterated its recognition of the inherent authority of Indian nations to impose their taxes on nonmembers on fee lands within the exterior boundaries of an Indian reservation. *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). *Strate* concerned the adjudicatory authority of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation over a personal injury action with nonmember defendants. The accident that generated the personal injury action occurred on a highway maintained by the State running through the Fort Berthold Indian Reservation. Neither of the parties to the auto accident were members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. The Court held that the specific right-of-way grant in *Strate* was equivalent to non-Indian land for nonmember governance purposes. *Strate v. A-1 Contractors,* 520 U.S. 438, 454 (1997). The Court then determined that the highway accident did not meet either of the two retained inherent sovereignty exceptions identified in *Montana. Strate,* at 457-459.

The Court held that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation did not possess adjudicatory authority over the personal injury claim where both of the automobile accident participants were not members of the Tribe. In making its determination, the Court reinforced the validity of a line of cases that support inherent tribal taxing authority over nonmember economic activity on fee lands within the

exterior boundaries of an Indian reservation. *Strate,* at 457.

The Court in *Strate* recognized that the inherent civil authority of Indian tribes and their courts extended to nonmembers who enter relationships with the tribe or its members, citing *Montana,* 450 U.S. at 565, 566; and to non-Indians entering the reservation to engage in economic activity, citing *Colville,* 447 U.S. at 153. *Strate,* at 457. This Court explained its understanding of the type of cases that fit within the first *Montana* inherent authority exception for "activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Strate,* at 457.

> *Montana*'s list of cases fitting within the first exception, see 450 U. S., at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee,* 358 U. S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock,* 194 U. S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright,* 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville,* 447 U. S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain

unless divested of it by federal law or necessary implication of their dependent status").

It is abundantly clear that the trilogy of decisions in *Montana, Merrion* and *Strate* have recognized a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases have recognized the factual situation in *Buster* as being an exception to the *Montana* rule. The factual situation in this case calls for the identical result. A tribe's power to tax is broader than its civil adjudicatory jurisdiction over nonmembers. *Burlington Northern R. Co. v. Red Wolf,* 196 F.3d 1059, 1063 (9th Cir. 2000).

CONCLUSION

The power to tax is a fundamental attribute of sovereignty which the Navajo Nation retains. The taxing power enables the Navajo Nation to pay for the cost of governmental services it provides throughout the Navajo Reservation. The fact that a minuscule portion of the Navajo Reservation is owned in fee does not deprive the Navajo Nation of its taxing power over travelers who rent hotel rooms located on these fee lands. The overwhelming trust land area, the Navajo population and the predominance of Navajo governmental services support the imposition of the hotel occupancy tax on travelers who are the recipients of the benefits of an organized society.

It is only appropriate that the travelers contribute a small amount to the funding of the governmental services from which they benefit.

The judgement of the Court of Appeals should be affirmed.

Respectfully submitted this 15th day of February, 2001.

NAVAJO NATION
DEPARTMENT OF JUSTICE

LEVON B. HENRY
Attorney General

MARCELINO R. GOMEZ*
Assistant Attorney General
P.O. Drawer 2010
Window Rock, Navajo Nation,
AZ 86515
(520) 871-6347
Counsel for Respondents